

# Mediating Massacres: When “Neutral, Low-Power” Models of Mediation Cannot and Should Not Work

MELANIE GREENBERG\*

## I. INTRODUCTION

This symposium issue asks the important question of whether international dispute resolution is being “Americanized.” During the conference, many panelists pointed critically to the role of American lawyers in turning neutral international processes of negotiation and arbitration into platforms for adversarial, win-lose, paper-driven, and rule-bound posturing. This Article, which focuses on the use of mediation in situations of armed conflict, makes a different argument: not that one American style dominates international mediation, but rather that a form of mediation almost universal in the American domestic landscape can prove harmful and dangerous when used in international situations of armed conflict. Mediation is such a universal dispute resolution process, used in so many formal and informal settings around the world, that it is impossible to make a claim for American dominance of the field or American hegemony over any particular type of mediation. American diplomats use such a wide range of mediation styles in their mediation of international armed conflict (from Richard Holbrooke at one extreme, using NATO force as a backdrop to his muscular persuasion of the parties at Dayton, to George Mitchell in Northern Ireland, using only the force of his will and perseverance to influence the parties to reach the Good Friday Agreement), that there is no way to single out a typically American style.

However, there *is* one form of mediation that dominates the *domestic* landscape of American mediation, which mediators have used with wildly mixed results to resolve international armed conflict. This form of mediation,

---

\* Visiting Scholar, Johns Hopkins School for Advanced International Studies. The author would like to thank Amy Appleton, Ellen Babby, Cynthia Cook, Lawrence Greenberg, Meyer Kestnbaum, Paul Williams, the faculty of George Mason University’s Institute for Conflict Analysis and Resolution, and participants in the November 2002 symposium at The Ohio State University for their insightful comments on earlier presentations of this Article. The author would also like to thank Professor William Zartman for his wisdom and encouragement during my stay at SAIS. The author further gratefully acknowledges support from the William and Flora Hewlett Foundation, for the fellowship that made this Article possible.

which I call "Neutral-Low Power Mediation" [hereinafter NLP mediation], would be instantly recognizable to anyone involved in a law school mediation seminar, a victim-offender mediation program, a community mediation program, a divorce mediation, a labor mediation, or a peer mediation program in an elementary school. While NLP mediation is neither a strictly American invention, nor exclusive to American conflicts, its pre-eminent role in the landscape of mediation in this country is extraordinary.<sup>1</sup> This Article will outline the structure and presumptions of NLP mediation; will examine two cases in which NLP mediation failed, at the cost of great human suffering (Bosnia and Rwanda); and will suggest a set of contexts (illustrated by the Good Friday Accords and the Oslo Accords) in which NLP mediation can be a creative and powerful force for peace.

## II. CHARACTERISTICS OF NLP MEDIATION

The hallmark of NLP mediation is a mediator whose primary role is to help the parties in their own communication and negotiation.<sup>2</sup> This form of

---

<sup>1</sup> Why this form of mediation is dominant in the United States would make an interesting paper in its own right. Possible reasons include the existence of a strong legal system in the United States, in which parties who need enforceable, adjudicative decisionmaking have recourse to courts or arbitral proceedings. Also, there is a narrower nomenclature for domestic mediation. A third party intervening in a domestic dispute with great power, rich resources to bring to bear on the conflict, and strong influence over a particular party—akin to Richard Holbrooke in Bosnia—would likely be called an intervenor, and not a mediator.

<sup>2</sup> See, e.g., ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 338 (3d ed. 2002) ("A mediator is essentially a facilitator of communications between the parties, assisting them to engage in a dialogue directed toward mutual resolution of their dispute"); Jacob Bercovitch & Allison Houston, *The Study of International Mediation: Theoretical Issues and Empirical Evidence*, in RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION 11, 12 (Jacob Bercovitch ed., 1996) [hereinafter RESOLVING INTERNATIONAL CONFLICTS]:

Whatever its specific characteristics, mediation must in essence be seen as an extension of the negotiation process whereby an acceptable third party intervenes to change the course or outcome of a particular conflict. The third party, with no authoritative decisionmaking power, is there to assist the disputants in their search for a mutually acceptable agreement.

*Id.* Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 39 (2002) ("Mediation, defined here as a social process in which a third party helps people in conflict understand their situation and decide for themselves what, if anything, to do about it, has a long history and roots in many cultures."); Kenneth Kressel, *Mediation*, in

mediation is typically an extension of the parties' own bilateral or multilateral negotiations, rather than a forum in which the mediator tries to browbeat the parties into agreement, or to push through solomonic judgments.

Within an NLP mediation, the roles of the mediator and parties are fairly circumscribed. The mediator can show a strong hand in shaping the process of the mediation, but not in influencing a particular outcome. Specifically:

- The mediator is expected to be neutral, with no bias toward any of the parties.

- The mediator typically brings no resources of his or her own and does not have power beyond moral persuasion to coerce a party into action.

- The mediator has full control of the mediation process, though parties usually have the power to accept or reject ground rules at the start of the mediation.

- The mediator keeps confidences and does not have the discretion to impart confidential information, even when it might benefit the parties.

- The mediator can ensure fair process but is not expected to impose a solution on the parties (though the mediator might suggest potential solutions, based on the parties' description of their own interests and potential areas of agreement).

- The mediator can help balance power dynamics within the mediation (for example, ensuring that each party gets equal time to talk, making sure each party has the resources to attend particular meetings, etc.) but cannot unilaterally take measures to render a party more or less powerful in an absolute sense.

The parties, too, have obligations and powers within the NLP mediation:

- Parties are expected not to "forum shop" during the course of the mediation (though they may have recourse to the courts if mediation breaks down).

- Parties either help set the ground rules or agree to the mediator's ground rules.

- Parties are expected to participate in good faith, not using the mediation as a delaying tactic, venue for stonewalling, or means solely for extracting confidential information from another party.

---

THE HANDBOOK OF CONFLICT RESOLUTION 522, 522 (Morton Deutsch & Peter T. Coleman eds., 2000):

Mediation may be defined as a process in which disputants attempt to resolve their differences with the assistance of an acceptable third party. The mediator's objectives are typically to help the parties search for a mutually acceptable solution to the conflict and to counter tendencies toward competitive win-lose strategies and objectives.

- Parties agree to keep information revealed in the mediation confidential (unless there are agreements otherwise).
- Mediation may or may not be binding, depending on the context, the rules governing the mediation, and the desires of the parties.
- The solution “belongs” to the parties, and not to the mediator.

There are great advantages to NLP mediation. The process is transparent, nimble, and procedurally fair. It allows for creativity and catharsis. The outlook of NLP mediation is egalitarian and optimistic, with an emphasis on developing a roadmap for future action. These characteristics, especially when combined with the ability of participants to pursue more binding, judicial processes if the mediation breaks down, make NLP mediation a powerful and attractive tool for resolving a wide range of disputes.

However, there are disadvantages to NLP mediation, as well. NLP mediation is difficult to enforce, and does not work well to rein in spoilers. Procedural justice does not always lead to normative justice, and the lack of procedural safeguards can leave less powerful parties with no recourse.<sup>3</sup> NLP mediation is not geared toward deep-seated societal conflict, which tends to require iterative, multi-level intervention, combining elements of muscular diplomacy, mediation, and grass roots initiatives.

The weaknesses of NLP mediation are amplified in contexts of violence, power asymmetry, and military crisis. In these situations, NLP mediation has the potential to be not only ineffective, but also morally suspect and dangerous. In the United States, NLP mediation is not used in cases of violent crime (victim-offender mediation does not encompass crimes such as assault, rape or murder), and tends not to be used in contexts where the power imbalances between parties are so blatant and inexorable that any mediated resolution would be tainted (for example, sexual harassment suits). Beyond the boundaries of the United States, the use of NLP mediation in situations of armed conflict has led, in at least two very high profile cases, to great human suffering on the ground and shame for the international community.

While NLP mediation is usually taught as a neutral, transparent process, it is actually quite value-laden. Mediation often has a strong forward-looking component, rather than exclusive focus on adjudicating past wrongs.<sup>4</sup> The

---

<sup>3</sup> For a critique of mediation, focusing on potential power imbalances and the waiver of rights that would be guaranteed by a court, see Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555-1607 (1991).

<sup>4</sup> See, e.g., Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 174 (2002) (“This new story fits neatly with a mediation model for resolving disputes since mediation is a forward-looking inquiry

mediator presumes good faith on the part of the parties.<sup>5</sup> Issues of culture and power tend to be subjugated to a more neutral definition of interests and joint goals, even in more transformative settings.

These values and presumptions, which make the mediation process nimble and forward-looking in many contexts, can be disastrous in situations of deep-rooted, intractable conflict, in which leaders manipulate international intervention to suit their own strategic aims. Parties, even when they profess to be in good faith, often continue to shift the balance of the power on the ground, through violence, as the mediation is taking place.<sup>6</sup> With the lack of an international police force, no entity can prosecute this extra-mediation violence, and the mediator must come to terms with the new power realities as the mediation unfolds. Power differentials between (and even among) the parties can hinder negotiation and can lead to coerced, ineffectual, or unjust agreements. The implementation of mediated peace agreements can be derailed by resentful, less powerful parties, or “spoilers” who never took part in the negotiations.

## III. FRAMEWORK FOR ANALYZING NLP MEDIATION

Mediation takes place along two important spectrums, which help define the goals of the parties and mediator. The first spectrum involves the range between first-track, crisis-level diplomacy on one hand, and facilitated, grass roots dialogue on the other. The second spectrum traces a path between problem-solving, task-oriented mediation (which seeks to find a solution based on the parties’ stated interests) and transformative mediation (which seeks to mend the parties’ relationship). The location of the mediation along these two spectrums is a strong predictor of the mediation’s potential for a successful outcome (with the caveat that even the best mediated outcome can crumble in the face of severe pressure).

---

designed not to evaluate fault and mete out justice, but instead to work on the issues underlying the dispute.”).

<sup>5</sup> For a discussion on good faith, see Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 961-62 (2001).

<sup>6</sup> In El Salvador and Bosnia, for example, bloody battles took place, and territory shifted hands, even as the mediation process unfolded. See Alvaro de Soto, *Ending Violent Conflict in El Salvador*, in HERDING CATS: MULTI-PARTY MEDIATION IN A COMPLEX WORLD 349, 374 (Chester A. Crocker et al., eds., 1999) [hereinafter HERDING CATS]. See generally LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION (1995).

Ultimately, the chances for failure or success of NLP mediation will depend heavily on four major structural factors, including the spectrums described above:

- 1) Where the mediation falls on the continuum of "first-track" versus "grass-roots" processes (the mid-point of the spectrum works particularly well with NLP mediation);
- 2) Whether the mediation focuses more on problem-solving or transformational processes (an emphasis on transforming the political relationship between parties works well in NLP mediation);
- 3) Whether the conflict is "ripe" for resolution; and
- 4) Whether six particular "red flags" involving the power and commitment of particular parties are present.<sup>7</sup>

This Article will apply the above framework to four recent NLP mediations, to test which combinations of elements produce the best chances of success.

#### *A. High-Visibility/Official versus Low-Visibility/Unofficial Mediation*

NLP mediation can take place in situations of high visibility and crisis, or in absolute secrecy over a period of years. Parties to the mediation might be first-track diplomats, second-track citizens (influential citizens with close ties to government or with strong influence in their communities), or grass-roots participants. In first-track mediation, high government leaders negotiate, with high stakes, often in the public eye. In second-track mediation, government leaders might take part in their "private" or "deniable" capacities, or highly placed citizens with governmental connections might take their place. The "audience effect"<sup>8</sup> that takes hold in first-track mediation often derails the process, since parties feel they need to play to their constituencies rather than make painful compromises. Second-track mediations allow for more privacy, more time, and more artful compromise, and it is in this domain that NLP mediation often flourishes.

---

<sup>7</sup> Kressel, *supra* note 2, at 524-25.

<sup>8</sup> See, e.g., Mary Joe Eyster, *Clinical Teaching, Ethical Negotiation, and Moral Judgment*, 75 NEB. L. REV. 752, 768 n. 44 (1996) (citing JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 44-46 (1975)).

B. *Problem-Solving Versus Transformative Aspects of NLP Mediation*

NLP mediation takes place along a continuum of problem-solving and transformative goals, with the mediator's role taking on somewhat different forms depending on where on the spectrum the mediation lies.<sup>9</sup> The difference between problem-solving and transformative mediation is often described as the difference between finding a *concrete settlement* for the dispute (problem solving) and working to improve the *relationship* between the parties themselves (a more therapeutic model). In the former model, the mediator plays a more active role in helping the parties create specific solutions, while in the latter the mediator acts more as a channel for a healing conversation.

Problem-solving mediation focuses on the individual needs of the parties, seeking to find a resolution that best harmonizes their stated interests. "The elements of problem-solving discipline are definition [of the problem], searching, evaluation, and choice."<sup>10</sup> This view of mediation is closely related to interest-based bargaining, with the mediator helping the parties clarify their interests, brainstorm suggestions, craft packages that bundle the parties' interests, and help plan for implementation of the accord. Within this framework, the successful mediator is one who can:

generate an agreement that solves tangible problems on fair and realistic terms, and good mediator practice is a matter of issue identification, option creation, and effective persuasion to "close the deal." In this model there is heavy reliance on mediator initiative and direction, because both are useful in generating settlement.<sup>11</sup>

Transformative mediation, by contrast, reaches beyond settlement of the dispute, and seeks to repair the relationship between the parties.<sup>12</sup> This form of mediation "takes an essentially social-communicative view of human conflict."<sup>13</sup> The main goals of the mediation are for the parties to gain

---

<sup>9</sup> There is debate in the field as to whether problem-solving and transformative goals are opposed and mutually exclusive, or whether they can co-exist on a continuum. For an overview of this argument, see Neal Milner, *Mediation and Political Theory: A Critique of Bush and Folger*, 21 LAW & SOC. INQUIRY 737, 740-41 (1996).

<sup>10</sup> Edwin H. Greenebaum, *On Teaching Mediation*, 1999 J. DISP. RESOL. 115, 123.

<sup>11</sup> Della Noce, *supra* note 2, at 49.

<sup>12</sup> See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 81-112 (1994) (creating a model of transformative mediation and arguing for its efficacy).

<sup>13</sup> Della Noce, *supra* note 2, at 50.

“empowerment and recognition,”<sup>14</sup> and to transform their negative spiral of interaction into something more positive.<sup>15</sup> The mediator’s role in this transformative process is not one of idea generation and bundling, but rather one of listening, reflecting, and gently guiding conversation.

The transformative mediator is not the director of the discussion. . . . The mediator supports, but never supplants, party decision-making. He assists the parties with their decisions by helping to identify choice points throughout the conversation, and by restraining himself from making any decisions for the parties about the process itself or the substantive result. . . . So, while intensely engaged in listening and observing and enacting supportive responses, the mediator constantly maintains an awareness of and represses directive impulses.<sup>16</sup>

NLP mediation can encompass both these forms of mediation, but with greatly different results in the international arena. NLP mediation tends to be more durable and successful when it falls closer to the transformative end of the spectrum, especially when the talks do not focus on one particular military crisis, and when parties are at the table willingly, and in good faith.

### C. Ripeness and Red Flags

The degree of “ripeness” for mediation will determine to a great extent the outcome of the mediation. Ripeness, a term coined by William Zartman, describes a “mutually hurting stalemate” in which each side is strong enough to inflict some damage on the other, yet neither can win a military victory.<sup>17</sup> At this point, the dispute might be “ripe” for intervention and resolution.<sup>18</sup> Ripeness usually refers not to a particular moment, but to a series of

---

<sup>14</sup> Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 82 (2002) [hereinafter Bush & Pope] (internal quotation marks omitted).

<sup>15</sup> See *id.*

<sup>16</sup> *Id.* at 93. For more on the specific roles of mediators in problem-solving and transformative mediation, see, for example, *id.* at 83; Greenebaum, *supra* note 10, at 130–31; Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 29 (1982); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 23–24 (1996); Kumar Rupesinghe, *Mediation in Internal Conflicts: Lessons from Sri Lanka*, in RESOLVING INTERNATIONAL CONFLICTS 153, 154–56 (Jacob Bercovitch ed., 1996).

<sup>17</sup> I. WILLIAM ZARTMAN, *RIPE FOR RESOLUTION: CONFLICT AND INTERVENTION IN AFRICA* 268 (updated ed. 1989).

<sup>18</sup> *Id.*



windows of opportunity in a dispute, in which the parties have reached such war-weariness that they are ready to mediate an end to the dispute. Since military resources, political tides, leadership, and external resources vary so much in the course of a deadly conflict, windows of opportunity for ripeness can be fleeting and transient, and the mediator must judge carefully whether the time is right for fruitful intervention.

Kenneth Kressel lays out six factors that correlate strongly with a reduced chance of success in mediation.<sup>19</sup> While he does not point specifically to international conflict (his research has focused more on divorce and labor mediation), the danger signs he cites are especially relevant in NLP mediation in situations of deadly conflict. These factors include:

- High levels of conflict (measures include “severity of the prior conflict between the parties; a perception that the other is untrustworthy . . . and the existence of strong ideological or cultural differences”)
- Low motivation to reach agreement
- Low commitment to mediation (“settlement rate[s are] lower [when one or more of] the chief negotiators [is] unenthusiastic about mediati[ng], or [distrusts] the mediator”)
- Shortage of resources
- Disputes involving “fundamental principles”
- Parties of unequal power (“disputes in which one side is much more powerful than the other (more articulate, more self-confident, better able to withstand the economic and political consequences of a stalemate) are among the most difficult to mediate.”)<sup>20</sup>

When these factors are coupled with a weak mediator, who brings only moral suasion to the mediation, the results on the ground can be disastrous, as the following two cases illustrate.

### IV. BOSNIA AND RWANDA: MEDIATING MASSACRES

In Bosnia and Rwanda, NLP mediation was an insufficient tool to stop the bloodshed or prevent genocide. In both cases, all the danger signs pointed to failure: the mediated agreements failed to satisfy powerful spoilers; the mediations took place on a highly visible stage, with top government leaders, during a time of crisis and tension; problem-solving trumped relationship building; and numerous red flags pointed to a lack of commitment by important parties.

---

<sup>19</sup> Kressel, *supra* note 2, at 525.

<sup>20</sup> *Id.*

The use of NLP mediation in Bosnia and Rwanda, rather than alleviating the conflict in those desperate countries, allowed intransigent and irredentist leaders breathing room to organize and conduct ethnic cleansing, and to pursue their military aims under cover of mediation. In Bosnia, the mediation was little more than a fig leaf for the assertive military intervention that the United States and the European Union were unwilling to employ in the conflict. In Rwanda, the mediation effort was sincere and well executed, but the lack of cohesion between the Hutu representatives, and the exclusion of powerful spoilers from the talks, led to a failure of implementation, and to the ensuing genocide. In each of these cases, all six of Kressel's red flags for mediation failure waved horribly from the start.<sup>21</sup> These cases illustrate the danger of trying to use mediation to create a safe space, while ignoring practical realities on the ground, power dynamics between the parties, and structural difficulties in the societies that make reconciliation extremely difficult.

#### A. *Bosnia*

Bosnia was the first test of Europe's ability to manage deadly conflict within its borders after the fall of the Soviet Union. Even as diplomats proclaimed the dawning of a new day in Europe, power-hungry and intransigent leaders were preparing to carve up Yugoslavia, with dire consequences for many of its citizens.<sup>22</sup> The Balkans have been a conflict flashpoint for centuries, a result of their geographic location at the intersection of the Ottoman and Austro-Hungarian empires. The first shots of World War I rang out when a Serb nationalist's bullet killed Archduke Franz

---

<sup>21</sup> *Id.* at 524–25.

<sup>22</sup> For a full account of the break-up of the former Yugoslavia, see LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1995) and SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* (1995). For a detailed description of the mediation processes leading up to the Dayton Accords, see Melanie C. Greenberg & Margaret E. McGuinness, *From Lisbon to Dayton: International Mediation and the Bosnia Crisis*, in *WORDS OVER WAR: MEDIATION AND ARBITRATION TO PREVENT DEADLY CONFLICT* 35–75 (Melanie C. Greenberg et al. eds., 2000) [hereinafter *WORDS OVER WAR*]; Keith Webb et al., *The Yugoslavian Conflict, European Mediation, and the Contingency Model: A Critical Perspective*, in *RESOLVING INTERNATIONAL CONFLICTS* 171 (Jacob Bercovitch ed., 1996). For more on the international response to Bosnia, see Paul R. Williams & Karina M. Waller, *Coercive Appeasement: The Flawed International Response to the Serbian Rogue Regime*, 36 *NEW ENG. L. REV.* 825, 829–44 (2002) and Peter W. Galbraith, *Washington, Erdut and Dayton: Negotiating and Implementing Peace in Croatia and Bosnia-Herzegovina*, 30 *CORNELL INT'L L.J.* 643 (1997).

Ferdinand of Austria, and violence between Serbs and Croats in World War II left terrible scars on the historical memory of these groups. Under communist dictator Josip Broz Tito, Yugoslavia existed as a delicately balanced federation, with any claims to ethnicity or nationality subsumed in the larger mantle of "brotherhood and unity"<sup>23</sup> in Yugoslavia. Serbs, Croats and Muslims intermarried, spoke the same language, educated their children in integrated schools, and lived in mixed cities and neighborhoods. When Tito died in 1980, the exceedingly complex joint federal presidency started to waver, and within several years fell prone to nationalist maneuverings by power-hungry leaders in Croatia and Serbia.<sup>24</sup>

In 1987, Slobodan Milosevic gave an incendiary talk in Kosovo to a rally of over a million Serbs, raising in a public and provocative way the possibility of a "Greater Serbia" in the territory of Yugoslavia.<sup>25</sup> In 1990, Franjo Tudjman, the nationalist leader of Croatia, won election on a platform of secession from Yugoslavia, and set about on a course of expanding Croatia into Serb and Bosnian Muslim territory.<sup>26</sup> Horrific ethnic cleansing of Croats by Serbs on Croat territory (the ancient town of Vukovar was razed) presaged even greater bloodshed throughout Bosnia in the years to come.<sup>27</sup>

In 1991, both Slovenia and Croatia declared independence from the rump Yugoslavia.<sup>28</sup> The European Community (hereinafter "EC"), precursor to the European Union watched with great concern as Yugoslavia started to unravel. The EC established a Peace Conference on Yugoslavia in 1991, in the midst of the civil war between Croats and Serbs.<sup>29</sup> The Peace Conference, chaired by Lord Carrington, established mediation efforts in Croatia, cease-fire agreements, and the Badinter Commission, which sought to establish the legality of the potential secession of Croatia and Bosnia from Yugoslavia. Cyrus Vance (acting on behalf of the United Nations) and Lord Carrington mediated between the Serbs and Croats, with only short-term results.<sup>30</sup> The Badinter Commission was upstaged by Germany's unilateral

---

<sup>23</sup> JOHN R. LAMPE, *YUGOSLAVIA AS HISTORY: TWICE THERE WAS A COUNTRY* 232 (1996).

<sup>24</sup> See WOODWARD, *supra* note 22, at 21-146.

<sup>25</sup> See SIBLER & LITTLE, *supra* note 22, at 37.

<sup>26</sup> *Id.* at 90.

<sup>27</sup> *Id.* at 176-80.

<sup>28</sup> *Id.* at 77-78.

<sup>29</sup> *Id.* at 190-91.

<sup>30</sup> Alan Hanson, *Croatian Independence from Yugoslavia, 1991-1992*, in *WORDS OVER WAR*, *supra* note 22, at 76, 79.

decision to recognize Croatia's independence in late 1991,<sup>31</sup> which set in motion Bosnia's declaration of independence and subsequent recognition from the United States and European countries in the spring of 1992.<sup>32</sup>

Once Croatia and Bosnia had seceded from Yugoslavia, Croatia and Serbia conducted vicious ethnic cleansing campaigns to clear large swathes of Bosnia of Bosnian Muslims, in order to allow Croatia and Serbia to annex Bosnian land.<sup>33</sup> Bosnian Serbs, under the leadership of Radovan Karadzic and Ratko Mladic, established a siege in Sarajevo, and chased hundreds of thousands of Bosnian Muslim families from the Drina River region, contiguous to Serbia.<sup>34</sup> There, they gathered in overcrowded enclaves like Srebrenica and Gorazde, which later became execution sites under the eyes of powerless UN peacekeepers. During the summer of 1992, pictures from the Osarka concentration camp, where Bosnian Muslim men were starved and tortured, created outrage in the West, bringing about calls for action.<sup>35</sup>

The United States, about to enter into a presidential election campaign, was noncommittal. The United Nations authorized a peacekeeping force for the sole purpose of guaranteeing the delivery of humanitarian aid. NATO was unwilling to use military force to stop the ethnic cleansing, and individual European States also refused to send troops. Instead, the United Nations and the European Community suggested a joint mediation effort, to try to resolve the Bosnian conflict. Cyrus Vance agreed to mediate on behalf of the United Nations, and the respected British diplomat Lord David Owen, agreed to represent the European Community. Vance and Owen acted under the auspices of the International Conference on the Former Yugoslavia (ICFY), a loose forum of European nations established in September 1992 to monitor and resolve the unraveling situation in Yugoslavia.<sup>36</sup>

The mediation took the form of a classic NLP mediation. The mediators held very little leverage over the parties, and were unable to rally international military support to enforce any agreement. As Lord Owen reflected in his memoirs, "The daunting challenge for the ICFY in November 1992 was whether, armed only with moral authority and weak economic sanctions, and with no credible threat of selective counterforce, we could roll back the Serb confrontation lines and create a new map."<sup>37</sup> The central goals

---

<sup>31</sup> *Id.* at 104.

<sup>32</sup> Greenberg & McGuinness, *supra* note 22, at 44.

<sup>33</sup> *Id.* at 46.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 48.

<sup>37</sup> DAVID OWEN, *BALKAN ODYSSEY* 67 (1995).

of the mediation were to stop the fighting, to roll back some of the 70% of Bosnia that the Bosnian Serbs had commandeered through ethnic cleansing, and to keep Bosnia a multi-ethnic state. The parties to the mediation were Milan Panic, a Serb who had moved to the United States and led a multinational drug company; Dobrica Cosic, a Serb intellectual whom Milosevic had appointed to be president of the rump Yugoslavia; Mate Boban, the Bosnian Croat leader (communicating closely with Franjo Tudjman in neighboring Croatia proper); Alija Izetbecovic, the president of the Bosnia and leader of the Bosnian Muslims; and later Slobodan Milosevic himself.<sup>38</sup>

Vance and Owen, after discussions with the parties, developed a plan that would divide Bosnia into ten cantons, three with a Serb majority, two with a Croat majority, three with a Muslim majority, and one with a mixed Croat-Serb majority. Sarajevo, the tenth canton, would be ruled by a loose coalition of three groups.<sup>39</sup> On the positive side, the Vance-Owen Plan kept Bosnia intact as a multi-ethnic, non-partitioned state, did not change international borders, and did not give the Bosnian Serbs territory contiguous to Serbia proper. On the negative side, the plan rewarded the Bosnian Serbs for their ethnic cleansing by granting them more land than they had before the war; the governmental structure was too weak to rule the fragmented country; and the land swaps would be impossible without military enforcement.<sup>40</sup>

The Vance-Owen Plan failed quickly, for reasons predictable when NLP mediation is used in situations involving deep-rooted violent conflict. The mediation was highly visible, and focused on a specific outcome, rather than on a change of relationship between the parties. Even more important, the mediators lacked any leverage or enforcement power, and the conflict was utterly "unripe" for resolution. In order for the Vance-Owen Plan to succeed, military intervention and peacekeeping forces were necessary for overseeing land swaps, and the threat of military force was needed to soften Serb intransigence in accepting the Plan. This military muscle was not forthcoming in any way from the International Community. Peacekeepers were allowed only to assure humanitarian aid, with tragic results in Srebrenica and other Muslim enclaves.<sup>41</sup> NATO was unwilling to commit to air strikes,<sup>42</sup> and, most important, the new President Clinton was unwilling to

---

<sup>38</sup> WORDS OVER WAR, *supra* note 22, at 47.

<sup>39</sup> *Id.* at 48.

<sup>40</sup> *Id.*

<sup>41</sup> Greenberg & McGuinness, *supra* note 22, at 51–53.

<sup>42</sup> *Id.* at 50.

back the Vance-Owen Plan with force. He proposed, instead, a policy of “[L]ift [the arms embargo] and strike [the Serbs],” which Secretary of State Warren Christopher seemed to know would be a non-starter for European countries fearful of having their peacekeeping forces come under American or NATO fire.<sup>43</sup> With no enforcement policy, the mediators and the parties knew that the process was ineffectual. They counted on using a plan with contradictory interpretations that the parties could all sign, in the hope that these contradictions could be negotiated once peacekeepers were in place and the violence had died down.<sup>44</sup>

The Vance-Owen mediation also turned the concept of ripeness on its face. Whereas mediation (especially NLP mediation) depends on the parties being ready to mediate, in this case the parties had very little incentive to mediate. It was the international community, seeing pictures of the violence in Europe’s backyard that decided something had to be done immediately. The parties had not reached a mutually hurting stalemate.<sup>45</sup> The Bosnian Muslims continued to seek international aid, with muscle, to throw off the Serb siege of their territory. The Croats held out hope that continued fighting would throw Serbs out of Croatia proper and would annex the Croatian sections of Bosnia. The Serbs continued to be willing to use force to cleanse larger swathes of Bosnia for annexation (or at least extremely close cooperation) into Serbia. While the violence certainly waxed and waned throughout the mediation process, the level of ripeness as far as the parties were concerned was nowhere near where it needed to be in order for a mediator to step in solely as a process facilitator.

In addition to the lack of “muscle” to help enforce the mediation, and the lack of ripeness for mediation, nearly all of Kressel’s predictive factors for mediation failure appeared in the Vance-Owen mediations.<sup>46</sup> First, there were clearly *high levels of conflict*. This was a war with the highest stakes, the deepest travesties of ethnic cleansing, and the largest-scale irredentist dreams of pathological leaders. Next, there was *low motivation to reach agreement* and *low commitment to the mediation*. The parties all had good reasons *not* to accept an agreement (Serbs could keep gaining land, Bosnian Muslims could hold out for a better agreement backed by the United States, and the Croats could keep fighting to gain ground in Bosnia). Mediation kept the Serbs a step ahead of financial sanctions, gave the Bosnian Muslims a platform for airing their grievances, and seemed not to be much of a risk to

---

<sup>43</sup> SILBER & LITTLE, *supra* note 22, at 287.

<sup>44</sup> *Id.* at 279.

<sup>45</sup> ZARTMAN, *supra* note 17, at 268.

<sup>46</sup> See Kressel, *supra* note 2, at 524–25.

the Croats. Beyond this, there were no deep desires for a mediated outcome. Milosevic signed the agreement and browbeat Karadzic to do the same, knowing full well that it would not be ratified by the Bosnian Serb legislature and would therefore be completely moot.<sup>47</sup>

The dispute involved *fundamental principles*. The principles involved in this dispute (ethnic partition, core identities, territorial integrity, self-determination, and the future of Europe and European peacekeeping) could not have had higher stakes. Mediation by itself could not begin to address these deep-seated issues, at least not at the highest governmental levels in a relatively short period of time. Finally, the parties clearly had *unequal power*. The Bosnian Muslims, while they had the sympathy of much of the world, had very little in terms of financial or military resources, and their main city of Sarajevo was kept under constant siege.<sup>48</sup> The Bosnian Serbs controlled large amounts of materiel and manpower seconded from the JNA (Yugoslav People's Army), while the Bosnian Croats gained support from Croatia (which, in turn, could fall back on its historical support from Germany).<sup>49</sup> Within this triangle, the Bosnian Muslims were forced to choose an agreement that would serve very few of their practical needs, with the possibility of holding out for a better agreement (with the tacit approval of the United States). The mediators had no carrots or sticks at their disposal, aside from weak threats of financial sanctions and transparently ineffective UN peacekeepers, to help level the playing field (as the United States did later by helping craft a Muslim-Croat federation that could push back Serb military advances).

But if the Vance-Owen peace process was flawed, the European Union's next foray into mediation ventured over the line into immorality. When the Vance-Owen process had clearly failed, Cyrus Vance left the process and was replaced by UN representative Thorval Stoltenberg. In contrast to the Vance-Owen Plan, in which the mediators themselves proposed a settlement plan, in this case the mediators invited the parties to submit what they felt to be reasonable solutions. Not only did this arrangement threaten the Bosnian Muslims (because the Croats and Serbs could gang up on the weaker third party), but the mediators tied the hands of the Bosnian Muslim delegation by accepting into the negotiations a Bosnian Muslim warlord from Western Bosnia, Fikret Abdic, who diluted the negotiating power of President Alija Izetbegovic.<sup>50</sup> The plan submitted by the Bosnian Croats and Bosnian Serbs

---

<sup>47</sup> SILBER & LITTLE, *supra* note 22, at 279.

<sup>48</sup> *Id.* at 205–21.

<sup>49</sup> *Id.*

<sup>50</sup> WORDS OVER WAR, *supra* note 22, at 55.

left the Bosnian Muslims with only thirty percent of Bosnia's territory, in a land-locked, economically unviable state.

David Owen, himself, stated that he "did not expect to be able to claim that what they achieved was an 'honorable settlement.'"<sup>51</sup> Remarkably, all three parties agreed to the solution suggested by the Bosnian Croats and Serbs, but after signing President Izetbegovic reneged, and the mediation process languished until the American and NATO-led initiatives that produced the Dayton Accords.

The Owen-Stoltenberg Plan, and, to a lesser extent, the Vance-Owen process, illustrate a central danger of a common dispute resolution axiom. Often, one hears in the field that a flawed conflict resolution process is better than none at all. However, in this case, using a flawed process, in which the central mediators, no matter how well intentioned, were too weak to help craft a fair and just agreement, led to great suffering on the ground. While the mediation process dragged on, the Bosnian Serb and Croat military and political leaders continued to wage war, causing great misery for displaced members of "cleansed" ethnic groups. The process bought time for the Bosnian Serbs, in particular, to consolidate their hold over Bosnian territory. Milosevic and Karadzic played a cagey game of agreeing to mediated settlements, then proclaiming their regrets when the Bosnian Serb parliament refused to ratify them. The Serbs used the mediation as a cover for their actions away from the CNN cameras, while the international community refused to muster the political will to end the violence with effective intervention. Well-intentioned as it might have been, and as seasoned as the diplomats were, the mediation process was simply a fig leaf covering the gulf of inaction on the part of the international community. This kind of intervention is worse than none at all.

## B. Rwanda

While the fighting continued in Bosnia, a genocidal wave of ethnic cleansing erupted in Rwanda in 1994.<sup>52</sup> The Rwandan genocide of 1994

---

<sup>51</sup> OWEN, *supra* note 37, at 206.

<sup>52</sup> For painful descriptions and cogent analyses of the Rwandan genocide, see ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (1999); PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998); Gilbert M. Khadiagala, *Implementing the Arusha Peace Agreement on Rwanda*, in *ENDING CIVIL WARS: THE IMPLEMENTATION OF PEACE AGREEMENTS* 463 (Stephen John Stedman et al. eds., 2002); ELIZABETH NEUFFER, *THE KEY TO MY NEIGHBOR'S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA* (2002).



followed a NLP mediation effort that produced the Arusha Accords (a power sharing agreement between Tutsi exiles, the Rwandan Patriotic Front, and a coalition of Rwandan government parties). The failure of the Arusha Accords resulted neither from a bad-faith mediation effort, nor an unskilled one. The Arusha Accords were a classic “facilitative dialogue” type of NLP mediation that produced an elegant and substantively rich agreement for power sharing. However, the lack of cohesion among the Rwandan delegation, and the exclusion of key spoilers from real power in the Accords, set the stage for genocide in the implementation period following the Accords. A mediator with the power to offer incentives to the spoilers, and to ensure adequate peacekeeping troops following the Accords—the kinds of powers not generally available to NLP mediators—might have been able to avert the grisly deaths of between 500,000 and one million people.<sup>53</sup> This was a clear situation in which a facilitative style of mediation produced results, yet was not a powerful enough tool to firmly resolve a fraught situation of potential violence.

The stage for ethnic violence in Rwanda was set after years of political rivalry between the majority Hutu population and the minority Tutsi population. During colonial times, the Germans and Belgians favored the Tutsis, who (in their opinions) were nobler looking, with tall statures and slim features. During the course of colonial rule, ethnic identification of Tutsi and Hutu, which previously had been fairly fluid, became rigidly classified. Tutsis held top government positions, and were favored in all aspects of education and civic life.<sup>54</sup> After independence in the 1960s, the majority Hutus gained control of government, and over 600,000 Tutsis fled to neighboring countries to escape the climate of violence and repression in Rwanda.<sup>55</sup> Decades of occasional violence between the two groups led to great tension and suspicion, and in 1990, the Rwandan Patriotic Front (RPF), a well-organized army of expatriate Tutsis, invaded Rwanda.<sup>56</sup> A series of international talks in 1990-1991 set the stage for the Arusha Accords, which commenced in 1992, with the goal of organizing a power-sharing government with representation by Hutus and Tutsis.<sup>57</sup>

While Tanzanian president Yoweri Musevina convened the talks, the key mediator of the Accords was Ami Mpungwe, a distinguished Tanzanian

---

<sup>53</sup> GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 263 (1995).

<sup>54</sup> *Id.* at 1–58.

<sup>55</sup> *Id.* at 61–74.

<sup>56</sup> *Id.* at 93–100.

<sup>57</sup> Joel Stettenheim, *The Arusha Accords and the Failure of International Intervention in Rwanda*, in *WORDS OVER WAR*, *supra* note 22, at 213–24.

diplomat. Before beginning the Accords, Mpungwe met frequently with top US and French diplomats, and exhaustively studied recent peace agreements in Cambodia, Liberia, Namibia, and South Africa to see if lessons could be applied in Rwanda.<sup>58</sup> He also studied the academic literature of peacemaking, looking for sustainable solutions for Rwanda.<sup>59</sup>

Mpungwe fashioned the mediation process as a combination of settlement talks over specific political issues and facilitative dialogue, to resolve the underlying causes of tension between Hutus and Tutsis. He tailored the process to combine elements of problem-solving and transformative elements, but the process kept a profile very close to pure track-one diplomacy, as each of the representatives was in constant contact with top leadership. As Mpungwe saw it, the mediation had several goals, and his job was largely facilitative:

First, the structure of the process should be designed to facilitate communication between the two parties. Second, the process should last for a long time to allow for changing perceptions as well as negotiation of a detailed text. Third, his own role, and that of his negotiation team, was not to hammer out a deal between the two but to facilitate dialogue and communication, channel input from the "observers," and create an environment in which the parties to the process could reach a mutually acceptable agreement. Moreover, Mpungwe's desired outcome was clear: not just a settlement that would freeze the conflict for a brief period, but a political *resolution* to the conflict and its (perceived) underlying causes, one that would be durable and even a model for African internal conflict.<sup>60</sup>

This is a classic NLP mediation, with elements of a facilitated public peace process—but with none of the deniability and secrecy that allow risk taking in non-diplomatic settings. The red flags that Kressel raises to predict mediation failure flew briskly in the Arusha Accords. There were certainly *high levels of conflict* between Hutus and Tutsis, with additional political complexity between the neighboring countries harboring Tutsi refugees and the Rwandan government led by President Juvenal Habyarimana. There was *low motivation to reach agreement*, and *low commitment to mediate* on the part of at least one of the key parties. While the RPF stood to gain a great deal from the talks (inclusion back into Rwandan government), and sent a high-level delegation to make sure their aims would be accomplished, the

---

<sup>58</sup> BRUCE D. JONES, PEACEMAKING IN RWANDA: THE DYNAMICS OF FAILURE 70–71 (2001).

<sup>59</sup> *Id.* at 70.

<sup>60</sup> *Id.* at 71.

Rwandan delegation had much to fear from the Accords and had far less incentive to mediate. They were stuck between a rock and a hard place. On one hand, they needed an agreement that would wrest the country away from civil war and from international pressure to mend the Hutu-Tutsi rift. On the other hand, the potential loss of power of many of the President's cronies and other hard-line groups made compromise nearly impossible.<sup>61</sup> A mutually hurting stalemate did not exist strongly enough to counter the hard-liners' fear of losing power, and so the conflict was not truly ripe for balanced, low-power mediation.

There was a clear *shortage of resources*. Rwanda is a desperately poor country, in a poor region of the world. Neither side had resources it could draw upon in the mediation, and the mediator did not have the leverage (despite the observer status of the United States and European countries) to order development aid to the parties. The dispute centered on *fundamental principles*: namely, participation in government and ethnic identity.

But the two most important obstacles to a durable agreement were *parties of unequal power*, and the inability of the international community to provide sufficient peacekeeping troops in the immediate aftermath of the Accords. The mediation was hamstrung from the beginning by the differentials in power between the governmental delegation and the RPF delegation. The difference in power had less to do with specific resources than with communication and decisionmaking styles, and perception of the other side. The RPF delegation (the expatriate Tutsis) was a highly disciplined group, with a clear chain of command back to the leaders of the RPF.<sup>62</sup> They had advanced cellular technology allowing them clear communication with one another and with their home base, while the Rwandan delegation often resorted to using hotel pay phones.<sup>63</sup>

The governmental delegation (known as the GoR delegation), by contrast, was riven with internal divisions. The delegation included members of "three different political parties or groups, including the opposition MDR and PL, and the most extreme hard-line group, the CDR."<sup>64</sup> The rifts between these groups ran deep, which made it nearly impossible for the GoR to present unified proposals or concessions in the talks. The mediator, in the facilitative role, had little power, beyond threatening to withdraw Tanzania's

---

<sup>61</sup> *Id.* at 72–73.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 73; see also Stettenheim, *supra* note 57, at 225.

<sup>64</sup> JONES, *supra* note 58, at 72. MDR stands for *Mouvement Democratique Republicain*; PL stands for *Parti Liberal*; and CDR stands for *Coalition pour la Defense de la Republique*.

support of the talks, to give the GoR delegation incentives that might have allowed them to present a more unified front, or that could have satisfied the claims of spoilers. There was no unifying body that could help tie together the needs of the moderates and hard-liners within the GoR, and there was also no mechanism for bringing popular opinion and the results of grass-roots peacemaking into the mediation (a potential development that could have bolstered the moderates against the spoilers).<sup>65</sup>

Ultimately, these spoilers not only derailed the peace process, but also set in place and conducted the genocide that took place only months after the Arusha Accords were signed. The spoilers—members of a hard-line political party associated with President Habyarimana, and especially his wife—were incensed with the Arusha Accords, which transformed them from holding near-total control of the government to filling only a minor seat in the power-sharing agreement. Even when allies of the RPF suggested that this was pushing the GoR delegation beyond the limits of what was politically sustainable, the RPF did not back down, and a lop-sided agreement was signed in Kigali.<sup>66</sup> The agreement was praised for its richness of problem-solving and the elegance of its final power-sharing arrangement,<sup>67</sup> yet the snubbing of the hard liners ultimately caused the Accords to implode.

President Habyarimana vacillated in his support of the Accords, calling them at one point in the negotiations “pieces of paper.”<sup>68</sup> But even his limited support was extinguished once his plane was shot down on April 6, 1994. On April 7, the genocide began in earnest, fueled by vicious anti-Tutsi propaganda and hate mongering on government-held radio stations, and organized by hard-line leaders. Vastly insufficient UN peacekeepers stood by helpless. When one group of Belgian peacekeepers was executed and paraded through the streets, the Belgians pulled out all remaining troops. General Romeo Dallaire begged the United Nations for more troops—another 2,500 men, in addition to the forces he had on the ground,<sup>69</sup> could easily have stopped the genocide—but the United Nations refused, putting an end to any hope of keeping the Arusha process (and over 500,000 Tutsis and moderate Hutus) alive.

What are the lessons to be learned from the Arusha Accords? The genocide was not pre-ordained. A strong, coordinated peacemaking effort

---

<sup>65</sup> *Id.* at 98.

<sup>66</sup> *Id.* at 95.

<sup>67</sup> *Id.* at 90 (“And indeed, at least on paper the Arusha Accords were a richly detailed blueprint . . .”).

<sup>68</sup> Stettenheim, *supra* note 57, at 226.

<sup>69</sup> NEUFFER, *supra* note 52, at 116–17.

that was able to force the government of Rwanda to share power (using military “sticks” and economic “carrots” in the process) might have been successful. But the area was not seen as strategic for the United States (especially in light of the recent debacle in Somalia), and no African body was strong enough to impose a strong Dayton-like arrangement on Rwanda. Once the genocide began, the United States refused to acknowledge the severity of the violence, and was not willing to take the political risk of sending troops (the State Department studiously avoided any mention of the “g” word—genocide—that would have required action). The United Nations did not feel compelled to act on General Dallaire’s desperate requests, without strong Security Council support. In this situation, perhaps no mediation effort could alone have resolved the deep problems underlying the Rwandan political situation. A coordinated spectrum of grass-roots dialogue, “public peace processes” that would have allowed for political movement in a confidential setting, and strong-armed, public mediation with a strong coordinator, might have been able to prevent a slide into bloodshed. Certainly, NLP mediation by itself, even if brilliantly and sensitively conceived and competently executed, only set the stage for future disaster.

#### V. NORTHERN IRELAND AND OSLO: NLP IN A TRANSFORMATIVE, GRADUATED SETTING

In contrast to Bosnia and Rwanda, NLP has a great chance for success when the mediation is a “transformative one, in which reaching agreement on outstanding issues as quickly as possible can be seen as secondary to addressing the overall conflict process and coming to terms with the historical background and pace of conflict processes.”<sup>70</sup>

NLP mediation seems to be most successful when it falls further along the spectrum toward facilitative dialogue, with an emphasis on conflict transformation, rather than on diplomatic problem solving. Facilitative dialogues have the advantages of secrecy (so there is less need for parties to play to the audience), flexibility (creative brainstorming of options is possible without immediate judgment), and time. Ripeness is less of an issue, since the dialogues are not meant to resolve immediate political issues (though, often, a creative dialogue can go a long way toward developing innovative solutions), and cease-fires are not necessarily a prerequisite for talks. A process in which the mediator plays a strong role in guiding the conversation between the parties and helping design ideas for joint action,

---

<sup>70</sup> Rupesinghe, *supra* note 16, at 156.

yet has no need to apply leverage for particular results, can be a powerful force toward reconciliation in deep-seated disputes.

Harold Saunders calls this middle ground between first-track, problem-solving mediation and grass-roots level facilitative dialogue a "public peace process."<sup>71</sup> Saunders goes out of his way to explain that this process is not classical diplomatic mediation:

This is not mediation. While many of a mediator's abilities may be helpful in this process, a mediator is usually asked to help participants reach a specific agreement about one defined problem or complex of problems. Sustained dialogue involves the full range of problems that affect the relationships involved. Its purpose is to change relationships so participants can deal with whatever problems arise using whatever peaceful methods seem appropriate.<sup>72</sup>

Even though Saunders argues that this is not mediation, in fact the role is just that of a NLP mediator in a transformative process. This is especially so when the parties are sufficiently high-powered and connected to governmental decisionmaking, that the process functions more like mediation than like grass-roots dialogue. It might be called "mediation minus" or "facilitative dialogue plus." In these settings, there is usually secrecy; deniability on the part of the parties involved; sustained dialogue over a long period of time; and a mediator who can help facilitate the emotional aspects of the conversation, as well as the concrete problem-solving.

The mediator is very much in a NLP mode: he or she has great control over the process, but not the substance of the talks. The mediator is primarily a facilitator of the parties' own communication, as they explore the psychological, historical, and emotional aspects of the dispute as well as plan for future action. Parties can explore and overcome power differentials when the stakes are lower, and when specific governmental policies are not at stake. Ripeness is not as critical when the talks take place over several years; sometimes the parties will be ready to talk, and other times they will not. Talks can be held even during political and military crises, and can be an escape valve for tension on both sides.

---

<sup>71</sup> See generally HAROLD H. SAUNDERS, *A PUBLIC PEACE PROCESS: SUSTAINED DIALOGUE TO TRANSFORM RACIAL AND ETHNIC CONFLICTS* (1999).

<sup>72</sup> *Id.* at 109.

### A. Northern Ireland

This hybrid process, a very successful form of NLP mediation, occurred in the Northern Ireland talks leading up to the Good Friday Agreement in April 1998, and in the Oslo talks that led, eventually, to the handshake on the White House lawn in September 1993.<sup>73</sup> The impact of these processes was so dramatic that the major leaders in each received the Nobel Peace Prizes for the years in which the respective agreements were signed. These processes were productive for several reasons, and were especially illustrative of how to maneuver around Kressel's red flags.<sup>74</sup>

The mediators, who started out as low-power facilitators, gradually developed enough moral authority and trust to move the parties to take dramatic leaps forward toward peace. The mediators were able to take parties with fairly *low commitment to mediation*, and inspire them to take ownership of the process. While *high levels of conflict* certainly defined both the Northern Ireland and Israeli-Palestinian disputes, the mediators were able to carve out a window in which the two sides could learn to trust the other side over a long period of time, so that violence occurring on the ground did not necessarily derail the talks. The talks addressed the problems of *fundamental principles* head-on, often creating innovative ways of sidelining major areas of contention (for example, setting up a separate track of negotiations on decommissioning in the Northern Ireland talks, or putting the question of Jerusalem last in the Oslo talks). Finally, the mediators were able to take parties of *unequal power* and level the playing field within the talks, making sure that each party was able to express its needs and aspirations.

In both cases, the conflicts were ripe for resolution. The parties had reached a point of stalemate, where popular support for violence was on the wane, and momentum toward peace had developed in the populace. These ripe moments can be fleeting, and the mediators took full advantage of the moment to nudge the parties forward. The long time frame of the talks, with their continued emphasis on core issues, helped the parties overcome the swells of violence and shifting political landscapes on the ground.

---

<sup>73</sup> Another example: While little is written about the process, Harold Saunders's long work in Tajikistan played an important role in the resolution of that country's civil war. Members of the dialogue eventually became members of government, helping to bring the work and ideas of the informal dialogue process to light as policy.

<sup>74</sup> See Kressel, *supra* note 2, at 524–25.

The Northern Ireland talks were a powerful form of second-track diplomacy, with strong support from first-track political leaders.<sup>75</sup> The prime ministers of Britain and Ireland organized the talks, and lent their unwavering support throughout. President Clinton gave his symbolic support, recommending former Senate Majority leader George Mitchell as a mediator, and remaining actively involved in the process of the talks. George Mitchell, John de Chastelain (a former Canadian general), and Harri Holkeri (former Prime Minister of Finland) led the International Body, which "was structured as a traditional consultative body without authority to impose its views on the parties. The strategy was to involve a neutral third party to facilitate problem solving through communication and analysis."<sup>76</sup> George Mitchell took on the chair of the Plenary Session and the Subcommittee on Decommissioning, General de Chastelain served as independent chairman of the Strand 2 negotiations (relationships with Ireland) and the Business Committee, and Harri Holkeri served as an alternate for any of these functions.<sup>77</sup> The participants were leaders of all the main Unionist and Republican parties, including Sinn Féin (the political arm of the IRA).

George Mitchell claimed that at the initial meetings of the Plenary Session, he was so distrusted by a number of the parties, that they refused to call him "Mr. Chairman."<sup>78</sup> Mitchell refused to be bullied by the parties, and he set the tone of meetings by outlining what came to be known as the "Mitchell Principles": insistence that political involvement in the talks must be tied to a renunciation of violence on the ground.<sup>79</sup> Senator Mitchell insisted that the key to his success was taking incremental steps and small procedural decisions that helped him gain the trust of the parties.<sup>80</sup> Ultimately, the trust was so strong that he was able to move up the deadline for the negotiations and set the stage for the Good Friday Agreement.<sup>81</sup>

---

<sup>75</sup> For more on the role of the mediators in the Northern Ireland dispute, in the words of the mediators themselves, see GEORGE J. MITCHELL, *MAKING PEACE* (1999) and John de Chastelain, *The Good Friday Agreement in Northern Ireland*, in *HERDING CATS*, *supra* note 6, at 431-69.

<sup>76</sup> Kevin King, *The Role of International Mediation in the Northern Ireland Peace Process*, in *WORDS OVER WAR*, *supra* note 22, at 182, 199.

<sup>77</sup> *Id.* at 203-04.

<sup>78</sup> Interview with former U.S. Senator George Mitchell by Melanie Greenberg and Kevin King, in Washington, D.C., Law Offices of Senator Mitchell (July 17, 1998).

<sup>79</sup> Kevin King, *The Role of International Mediation in the Northern Ireland Peace Process*, in *WORDS OVER WAR*, *supra* note 22, at 182.

<sup>80</sup> Interview with former U.S. Senator George Mitchell, *supra* note 78.

<sup>81</sup> *Id.*



Mitchell's fairness, perseverance, and control of the process emerge in this journalist's account of the talks:

Mitchell kept his counsel and quickly proved to be remarkably even-handed. Normally suspicious politicians, such as Ulster Unionist leader David Trimble, found themselves warming to the American, mainly because he is so transparently honest and took as firm a line with Sinn Fein as he did with the unionist factions. As Mitchell himself said at the very beginning of his Sisyphean task, he had to hold the middle ground and not waver from it because "each side assumes the worst about the other" . . . . Slowly, but surely, glib phrases such as "mutual respect and tolerance" became realities as Trimble and Adams found it was possible to sit in the same room without going for the jugular. In place of demands based on age-old historical wrongs, bargaining and negotiation became the norm as delegates were allowed to state and re-state their positions without interruption.<sup>82</sup>

The strong procedural rules, emphasis on inclusiveness, and moral authority that Mitchell brought to a situation that was at least open to the idea of ripeness helped move the process forward in a way that would not have been possible in a more visible, crisis-oriented setting.

## B. Oslo

Whereas the Northern Ireland agreements emerged out of a first-track diplomatic initiative, and continued as an initiative with many of the earmarks of a public peace process, the Oslo Accords began as a strictly second-track process, which gradually transformed into first-track diplomacy. In fact, for most of the life of the Oslo process, a "formal" track (the Madrid talks) was playing out in the front pages, while the Oslo process moved quietly behind the scenes.

The Oslo process began with a relationship between FAFO, a think tank connected with the Norwegian foreign ministry, and relationships they forged informally with Abu Ala, the director of the PLO's economic enterprise programs, and with Yossi Beilin, who became the Israeli deputy foreign minister following the 1992 Israeli elections.<sup>83</sup> In January 1993, the Israeli Knesset lifted the ban on direct meetings between Israelis and

---

<sup>82</sup> *Peacemaker Profile: Senator George Mitchell*, SUNDAY HERALD, Nov. 21, 1999, at 7, available at <http://www.sundayherald.com/5424>.

<sup>83</sup> William J. Bien, *The Oslo Channel: Benefits of a Neutral Facilitator to Secret Negotiations*, in WORDS OVER WAR, *supra* note 22, at 109, 119–21.

members of the PLO, raising the possibility of direct, unofficial talks between the two groups.<sup>84</sup>

The negotiations started out very tentatively and informally, with Professor Yair Hirschfield from Israel (a close friend of Yossi Beilin) meeting secretly with Abu Ala.<sup>85</sup> After the initial meeting, Abu Ala requested permission from Abu Mazen, a top PLO official, to continue the informal dialogue in Oslo.<sup>86</sup> FAFO's representative, Terje Larsen (married to Mona Juul, a top Norwegian diplomat), gathered a group of Israelis and Palestinians in Norway, on January 20, 1993, under the pretext of an academic conference on Palestinian living conditions.<sup>87</sup> This was a gamble for the Palestinians, who sent official representatives, while the Israelis sent lower-level intellectuals and non-governmental representatives.<sup>88</sup>

Before the Israeli government agreed to send official representatives to a back-channel set of talks, they insisted that the PLO representatives prove their influence with PLO leadership. As a test, the Israeli foreign ministry drafted a paragraph of language on refugee issues that they asked to be transported to the official Madrid talks. Larsen passed the language to Abu Ala, who gave the language to PLO officials in the Madrid talks.<sup>89</sup> When the officials at the Madrid talks "unknowingly approved a passage drafted by the Israeli Foreign Ministry,"<sup>90</sup> the path was clear for higher-level representation. Uri Savir, director general of the foreign ministry, joined the Oslo process when it became clear that, after five months of negotiation, "the Palestinians—especially Abu Ala, their senior representative—advanced some surprisingly flexible positions, far more practical than the legalistic tangles created by the 'non-PLO' delegation in Washington, made up solely of Palestinians from the occupied territories, which had been holding formal negotiations."<sup>91</sup>

The history of the Oslo Accords is too long and complex to describe in detail here, but the role of the Norwegian mediators was crucial. As the

---

<sup>84</sup> U.S. Department of State, The Middle East Peace Summit at Camp David, "Peace Process Chronology," at [http://www.state.gov/www/regions/nea/peace\\_chron.html](http://www.state.gov/www/regions/nea/peace_chron.html) (last visited Nov. 25, 2003).

<sup>85</sup> Bien, *supra* note 83, at 120.

<sup>86</sup> *Id.* at 109, 119–21.

<sup>87</sup> *Id.* at 121.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 122–23.

<sup>90</sup> *Id.* at 123.

<sup>91</sup> URI SAVIR, THE PROCESS: 1,100 DAYS THAT CHANGED THE MIDDLE EAST 4 (1998).

parties' trust in the process grew, the talks gradually moved from informal, second-track discussions, to first-track talks that incorporated the major issues of the intractable Israeli-Palestinian relationship. The talks were so secret that, when the parties announced the accord in August 1993, the world was completely taken by surprise.<sup>92</sup> The parties were well able to negotiate many issues on their own, but the facilitators monitored the process constantly, and urged the parties on when breakdowns threatened to derail the process. As Jan Egeland, foreign minister of Norway during the negotiations, later wrote:

This and subsequent breakdowns in the negotiations were always followed by daily contact with the parties by telephone. Larsen and Juul kept their cellular phones within reach on their twenty-four-hour watch and either called or were called by Uri Savir and Abu Alá continually to ask for or tell about developments on either side. This was an important part of our facilitation: to keep up a constant momentum by urging and begging them for new positions, clarifications, and talks.<sup>93</sup>

Terje Larsen, of the Norwegian think tank, was a classic NLP mediator, with no resources or leverage over the parties (aside from offering a cover story and meeting rooms). However, he and his colleagues provided the parties with a steam vent for tension, a means for trading ideas about creative solutions, a venue for meeting face-to-face, and a forceful push forward when obstacles threatened the path toward peace. The Oslo process was the mirror image of the Vance-Owen mediation.

- In Oslo, the talks were secret, so there was no playing to the audience;
- The discussions were forward-looking, rather than backward-looking, so the parties could avoid the traps of negotiating historical narratives;
- The process made a gradual transition from second-track to first-track negotiation, allowing the parties time to develop trust in the process;
- There was deniability at all times, so no party felt trapped;
- Key leaders supported the process, echoing yearnings for peace in the general populations; and
- The parties genuinely desired a transformation in the political relationship.

Oslo represented NLP mediation at its best, demonstrating the flexibility, transparency, and nimbleness that this form of mediation can bring to parties in conflict.

---

<sup>92</sup> Jan Egeland, *The Oslo Accord: Multiparty Facilitation Through the Norwegian Channel*, in *HERDING CATS*, *supra* note 6, at 529.

<sup>93</sup> *Id.* at 536.

## VI. CONCLUSION

No mediation process can guarantee peace. Often the implementation period is more violent than the pre-mediation period (e.g., Rwanda), and even the best process can unravel over time (e.g., the Middle East since the Oslo Accords). Ideally, mediation would take place in a broad network of peace building activities, ranging from cease-fire negotiations to long-term economic development. In this ideal world, clear communication and ideas would flow from one sector of peacebuilding to another, and parties would feel empowered to develop new relationships and institutions for more stable post-conflict societies. NLP mediation would operate beside both more and less coercive means of peacebuilding, with its flexibility and transparency used to their best advantage with well-intentioned and dedicated parties.

In the absence of this ideal world, NLP mediation can play an important role in helping parties build relationships that might lead to creative solutions for peace. But this tool, which has so many advantages in situations where parties have a genuine desire for peace, is not a panacea, and should not be a substitute for force, "mediation with muscle," strict economic sanctions, and other coercive means of stopping deadly conflict. NLP mediation can build peace, but not when the parties contemplate massacres instead.